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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of)

Implementation of Section 309(j)
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

REPLY COMMENTS OF

HUGHES COMMUNICATIONS GALAXY, INC. AND DIRECTV, INC.

Hughes Communications Galaxy, Inc. ("HCG") and DirecTv, Inc.

("DirecTv") hereby submit the following reply comments in the above-captioned matter.

In their initial comments, HCG and DirecTv strongly urged the Commission not to apply its newly obtained competitive bidding authority to either the direct broadcast satellite ("DBS") or fixed-satellite ("FSS") services. HCG and DirecTv observed that in keeping with the Commission's traditional, flexible approach to licensing these services, which is designed to take into account the special circumstances surrounding the construction, launch and operation of satellite systems, the Commission strenuously has sought to avoid any characterization of FSS or DBS satellite applications as "mutually exclusive." Thus, the fundamental substantive basis for the Commission to invoke its competitive bidding authority is lacking.^{1/} In addition, HCG and DirecTv pointed out that, given the proven success of the Commission's present group processing and licensing procedures for domestic FSS and DBS applications in accomplishing the efficient and fair

^{1/} As the Commission acknowledges, if mutual exclusivity among applications does not exist, a license is not subject to competitive bidding. In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rule Making, PP Docket No. 93-253 (October 12, 1993) ("Auction Notice"), at 7, ¶ 22; See Section 309(j)(1).
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allocation of the orbit-spectrum resource, there was no sound policy basis for processing FSS or DBS applications via auctions.

Virtually every commenter save one that addressed these or related issues supported HCG's and DirecTv's position.^{2/} One party, Century Communications Corporation ("Century"), has argued that competitive bidding procedures should apply to DBS, arguing (1) that a dwindling supply of unassigned DBS frequencies makes mutually exclusive applications inevitable; and (2) that the DBS service satisfies the Commission's requirements for allocation through competitive bidding. Both of these propositions are without merit.

As HCG and DirecTv observed in their initial comments, the Commission's interim processing guidelines for DBS applications reflected the Commission's determination that DBS applications "would not be considered mutually exclusive so long as sufficient channels and positions were available to cover all applications filed prior to the cut-off date."^{3/} Following the conclusion of the 1983 Regional Administrative Radio Conference

^{2/} See Comments of AT&T at 22 (observing that "no public interest would be served by requiring competitive bidding for . . . satellite services"); Comments of General Communication, Inc. at 14 (finding it "unclear" how fixed service satellite applications could ever be mutually exclusive and commenting that "auctioning in these instances does not appear appropriate"); Comments of Comsat Corporation at 6-7 (noting that "the Commission has gone to great lengths to avoid mutual exclusivity and to encourage negotiation and spectrum sharing arrangements to expedite the provision of new satellite services"); see also Comments of Loral Qualcomm Satellite Services, Inc. at 3 (no need to find mutual exclusivity among pending LEO MSS applicants); Comments of Motorola, Inc. at 5 (competitive bidding is inappropriate for Big LEO MSS applications because no mutual exclusivity is present); Comments of Motorola Satellite Communications, Inc. at 6 (absent finding of mutual exclusivity, there is no legal basis for subjecting MSS applications to competitive bidding); Comments of TRW Inc. (arguing that competitive bidding procedures are fundamentally unsuitable for assignment of spectrum among current global MSS applicants).

^{3/} Hughes Communications Galaxy, Inc., File No. DBS-84-02, 1985 FCC LEXIS 2731 (1985) (emphasis added); see Satellite Syndicated Systems, Inc., 99 FCC 2d 1369, 1370 & n.2 (1984); DBS Report and Order, 90 FCC 2d 676, 719 (1982).

(RARC-83), permanent processing procedures were established reaffirming the Commission's policy that orbital locations and channels for DBS would be considered interchangeable and equivalent.^{4/} The Commission decided that particular DBS orbital positions would be granted on a "first-come, first-served" basis,^{5/} and Part 100 of the Commission's rules governing DBS expressly seeks to preempt the potential for mutually exclusive applications, stating that "conflicting requests for frequencies and orbital positions will not necessarily give rise to comparative hearing rights as long as unassigned frequencies and orbital slots remain."^{6/}

Century concedes (as it must) that the supply of DBS frequencies is not exhausted, and that frequencies remain available for assignment to new entrants. Indeed, the Dominion Video Satellite case that Century cites to highlight "the growing competition for DBS channels"^{7/} in fact illustrates that even more channels may become available for

^{4/} See Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 FCC 2d 250, 253 (1983).

^{5/} Id.

^{6/} 47 C.F.R. § 100.13. Thus, in Hughes Communications Galaxy, Inc., the Commission observed:

The Commission has already affirmed the "first-come first-served" approach in response to another claim of mutual exclusivity and Ashbacker rights by a permittee opposing an orbit/channel reassignment . . . Unlike situations where the Ashbacker doctrine applies, i.e., where the grant of one application necessarily precludes another, only the assignment of interchangeable orbital locations is involved here. We do not view the requests by NEX and Hughes as mutually exclusive since sufficient orbital positions and channels remain available to make orbit assignments to all current permittees.

1985 FCC LEXIS at *8.

^{7/} Comments of Century at 5.

reassignment if DBS licensees fail to meet their due diligence requirements.^{8/} The Commission has found the presence of vacant channels to be dispositive in addressing questions of mutual exclusivity for DBS,^{9/} and contrary to Century's speculation, there is simply no basis for expecting that the Commission will be confronted with mutually exclusive DBS applications anytime soon, especially given its traditional efforts to avoid this result in the processing of satellite applications.^{10/} There is therefore no basis under the statute for invoking the Commission's competitive bidding authority for DBS in the near future.

Furthermore, Section 309(j)(6)(E) expressly states that nothing in the new competitive bidding legislation is intended to relieve the Commission of "the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in licensing proceedings."^{11/} As HCG and DirecTV urged in their initial comments, the Commission's

^{8/} Dominion Video Satellite, Inc., Memorandum Opinion and Order, DBS 92-01MP, FCC 93-430 (released Sept. 13, 1993). Century notes further that "it is important to recognize that some of the DBS permittees . . . may have their permits cancelled. Some current DBS permittees may never successfully implement their satellite systems, given the enormous cost and time needed to complete the approved projects." Comments of Century at 6. In the event that other DBS permittees fail to meet their diligence requirements as Century has postulated, this will increase rather than decrease the number of DBS channels available for reassignment, rendering the possibility of mutual exclusivity less and not more likely.

^{9/} See, e.g., Hughes Communications Galaxy, 1985 LEXIS 2731 (1985) (DBS) ("We do not view the request by NEX and Hughes as mutually exclusive since sufficient orbital positions and channels remain available to make orbital assignments to all current permittees.").

^{10/} In the fixed-satellite service, for example, even in situations where domestic satellite applicants have requested identical orbital locations, the Commission has resolved such conflicts through its processing procedures and orbit assignment orders, and avoided findings of mutual exclusivity. *Id.* at 839 & n.15; see, e.g., GTE Satellite Corporations, 84 FCC 2d 562 (1981).

^{11/} Section 309(j)(g)(E).

traditional group processing procedures for satellite applications have proved to be extremely successful in fulfilling this obligation, efficiently allocating the orbit-spectrum resource and rapidly deploying satellite systems to the public in a manner that responds effectively to a "complex process involving many factors, parties, and even at times, foreign countries."^{12/}

Significantly, although Century attempts to argue the technical applicability of Section 309(j) to DBS, it nowhere addresses the merits or proven history of the Commission's policies and group processing procedures in both the fixed satellite and DBS areas, which have been carefully and successfully developed by the Commission for over two decades. These policies and procedures have fostered the growth of a vibrant domestic satellite industry by ensuring the "timely implementation of facilities and services"^{13/} and have successfully permitted the Commission to adjust its policies to account for the inherent flexibility of satellite technology to respond to changing circumstances and growing user needs, and to provide adequate service over a significant range of orbital locations.^{14/} As HCG and DirecTv have urged, these policies are now doing the same for DBS, and they should not be displaced.

By its terms, Section 309(j) permits the use of auctions as a selection mechanism for licenses only if mutual exclusivity exists among applications that have not been accepted for filing. The Commission has evolved policies for avoiding mutual

^{12/} Cf. GTE Reconsideration Order, 93 FCC 2d at 839.

^{13/} Id. at 840.

^{14/} Id. at 838. From the beginning of these services, the Commission has recognized the high risk, large capital investment requirements and long lead times characteristic of the domestic satellite industry. Thus, the Commission's flexible licensing policies and procedures have avoided institutional restraints and inhibitions to the development of the technology, and have allowed the Commission to adjust its policies as experience dictates. Id.

exclusivity in the satellite area that take into account the unique aspects and requirements of that industry. Not only does this render the statutory basis for invoking the Commission's competitive bidding authority suspect, the success of these policies in fairly and efficiently allocating the orbit-spectrum resource yields no sound policy reason for invoking auction authority even if such a basis existed. The Commission therefore should reject Century's misguided suggestions.^{15/}

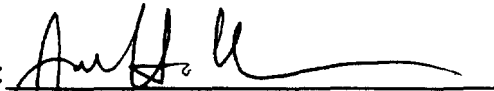
^{15/} One other party, the Association of America's Public Television Stations ("AAPTS"), argues that in the event that DBS applications might be subjected to competitive bidding, no competitive bidding procedures should be used for certain channel capacity that Congress, through Section 25 of the Cable Television Consumer protection Act of 1992, 47 U.S.C. § 335, mandated should be reserved for noncommercial educational or informational programming. See Comments of Association of America's Public Television Stations at 5-8. AAPTS correctly acknowledges that this section of the Cable Act was held unconstitutional in Daniels Cablevision, Inc. v. FCC, Civ. Nos. 92-2292, 92-2494, 92-2558, 1993 U.S. Dist. LEXIS 12806, at *20-*21 (D.D.C. 1993). The government has appealed this ruling. For the Commission to address this issue at present would plainly be premature, and in fact is unnecessary, given that DBS should not be subject to competitive bidding procedures at all for the reasons stated herein.

Respectfully submitted,

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